United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

75-1292

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P/S

To be argued by
WILLIAM F. DOW, III

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-1292

UNITED STATES OF AMERICA,
Appellee,

—v.—

PIERRIE LEVEQUE SOLOMON,
Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

BRIEF FOR THE APPELLEE

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Question Presented

Did the Court err in denying Appellant's Motion to Suppress the fruits of a warrantless search of a stolen rental truck and its contents where the evidence showed that the search was conducted on the premises of and with the consent of the vehicle's owner.

Constitutional Amendment Involved

AMENDMENT [IV]

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

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Docket No. 75-1292

UNITED STATES OF AMERICA,

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—v.—

PIERRIE LEVEQUE SOLOMON,

Appellant.

BRIEF FOR THE APPELLEE

Statement of the Case

This is an appeal from a judgment of conviction in the District of Connecticut entered by the Court (Newman, *J.*) on July 25, 1975, after jury verdicts of guilty on April 22, 1975. Appellant presses only one issue on appeal. He contends that his Fourth Amendment rights were violated by agents of the Federal Bureau of Investigation, who, with the consent of and on the premises the vehicle's true owner, conducted a warrantless search of a stolen rental truck that Solomon had driven. A motion to suppress the fruits of that search was filed, briefed by both sides, and an evidentiary hearing conducted. Judge Newman denied the motion and ruled the evidence admissible.

On April 4, 1974, a grand jury in New Haven, Connecticut returned a two-count indictment (Crim. No. N 74-37) charging Pierrie Leveque Solomon with knowingly

transporting a stolen motor vehicle in interstate commerce and with concealing that vehicle. Solomon was arraigned on April 8, plead not guilty to both counts and was released on bond. A Motion to Suppress Evidence was filed by the defendant on September 9, 1974, the Government's Memorandum in Opposition on November 7, the defendant's responsive memorandum on November 26. The evidentiary hearing was conducted by Judge Newman on November 26 and denied at the conclusion of the hearing.

A jury trial began on April 11, 1975 and verdicts of guilty on both counts returned on April 18. Solomon was sentenced by Judge Newman on July 21 and committed to the custody of the Attorney General for four years on each count, execution to be suspended after six months, followed by a five-year period of probation. The sentences are to run concurrently. A timely Notice of Appeal was filed on the day of sentencing and the defendant's release on bond continued pending resolution of this appeal.

Statement of Facts

The Search

Pierrie Leveque Solomon was arrested by Officer Robert Hall of the Milford, Connecticut, Police Department at the Mayflower Truck Stop on March 21, 1974. This occurred after Hall had responded to a call from that location by Joseph Synnett (Hearing Transcript 5). Synnett, then employed as Operations Manager for the Truck Division of the National Car Rental Company office in Bridgeport, was driving by the truck stop on that date and spotted a National truck at the gas pumps. He examined the National number painted on the truck and determined it had been stolen from National's Newark,

New Jersey office (HT 24). Synnett removed the keys from the ignition and asked the occupant if he had a rental agreement for the truck. After receiving a negative reply, he telephoned National's Bridgeport office, confirmed that the truck was stolen, and then called the Milford Police and asked for assistance (HT 24-5). When Synnett then confronted the driver, Solomon, he again asked to see the rental agreement. Solomon said he didn't have it with him but that it was at the office. The rental agreement is supposed to remain with the vehicle (HT 27).

When Officer Hall arrived at the Truck Stop, he spoke with Synnett and received the registration papers Synnett had obtained from the truck (HT 5). He then ran the registration number through the computerized National Criminal Information Center. When that check was negative, Hall then spoke by telephone with National's manager in Newark, New Jersey. Hall learned that a truck had been stolen from the Newark (HT 5-6, 27) lot and obtained its Vehicle Identification Number (VIN) (HT 8). He then checked that number with the VIN number on the truck, determined it was the same vehicle, and then placed Solomon, the driver, and his passenger under arrest and took them into custody (HT 9). He also determined that while the license plate matched the number on the registration papers obtained from the truck, the VIN number on those papers did not match the VIN number on the truck; in short, the registration was for a different National truck, and that truck had also been stolen (HT 9). Officer Hall then locked the truck after it was removed from the gas pump area and kept the keys (HT 10). A second officer remained with the truck and Hall took Solomon and his passenger to the Milford Police Department and contacted agents of the Federal Bureau of Investigation (HT 10).

Later that evening Synnet obtained the keys from the Milford Police Department and, with the help of an assistant, removed the truck from the Mayflower Truck Stop to Bridgeport, where it was locked in National's lot (HT 28). On the following morning, Milford Police Sergeant Hunt and two FBI agents went to the lot and asked for Mr. Synnett's permission to examine the truck. Synnett gave them permission and handed them the keys (HT 30).

Special Agent Steven Scheiner examined the trailer and the cab area of the truck. In the cab he found an unmarked, brown attache case which he opened in order to determine ownership and the existence of items of evidentiary value. In the attache case Scheiner found various papers including two New York City traffic tickets (HT 50-2). The briefcase and its contents were shown to the defendant and he admitted ownership (HT 54).

The Trial

Additional evidence was presented at trial. It was established that a green, 1973 GMC Astro "Tractor" had been stolen from the National Truck Rental lot in Newark, New Jersey at about 5:00 A.M. on March 13, 1974 (T. 4, 30-31). It was valued at approximately $28,000. At the time of the theft, the truck carried expired Massachusetts license plates (T. 9). Painted on the front and side was the National fleet number (T. 8, Ex. 1). Synnett's attention was drawn to the truck on March 21 because it was unusual for the green National rental trucks to "gas-up" at commercial pumps (T. 49). When the truck was recovered, the Massachusetts plates had been removed and one—the front one—had been replaced with a New Jersey plate which belonged to another truck stolen from National. The rear license plate was missing from the Solomon truck (T. 128).

The Government introduced the two New York City traffic tickets (Exs. 3 & 4) and Solomon's admission to receipt of the tickets while driving the truck (T. 149). One (Ex. 3) had been issued on March 15, 1974 (T. 155, Ex. 7) to the Massachusetts license plates on the truck when stolen (T. 135). The other (Ex. 4) was issued on March 20 to the New Jersey license plates on the truck when recovered. Also introduced were a bill of lading from a Brooklyn, New York furniture company (Exs. 5, 6) and a cost sheet from that company (Ex. 7) on which was indicated that Solomon had picked up a shipment in New York on March 20 and at that time the truck had carried the Massachusetts plates. The Government also introduced evidence that Solomon had possessed stolen rental trucks on four prior occasions (T. 190-3, 196).

ARGUMENT

The trial court properly denied Appellant's Motion to Suppress Evidence

Agents of the Federal Bureau of Investigation, with the consent of the owner (or, more properly, the owner's agent) searched a stolen truck and its contents while it was in the owner's custody. This search was conducted without a warrant. Appellant contends that the agents should have obtained a warrant and without one, the search was unreasonable and thus violated his rights under the Fourth Amendment. As the Supreme Court noted in *Cooper* v. *California*, 386 U.S. 58 (1967),

> It is no answer to say that police could have obtained a search warrant, for the "relevant test is not whether it is reasonable to procure a search warrant, but whether the search was reasonable." *United States* v. *Rabinowitz*, 339 U.S. 56 (1950) at 66. 386 U.S. at 62.

The Government submits that the consensual search here was eminently reasonable; conversely, it would be unreasonable to require the agents to obtain a warrant in these circumstances. Furthermore, even assuming the vehicle was in the custody of the police or the F.B.I., their possessory interest was clearly superior to Solomon's and the search was proper. Lastly, and more basically, the defendant has no standing upon which to base his claims of Fourth Amendment violations.

a. The warrantless search of a stolen motor vehicle and its contents, in the custody of and with the permission of its true owner, did not violate defendant's rights under the Fourth Amendment.

In this case the owner of a stolen truck had custody of his own vehicle and voluntarily consented to a search of that vehicle by F.B.I. agents. Appellant admits the truck was in the owner's possession (Appellant's Brief p. 22). He concedes the voluntary nature of the owner's consent. It is difficult to understand, then, how the owner lacks authority to consent to a search of his own property.

Appellant's reliance on *Chapman* v. *United States*, 365 U.S. 610 (1960) and *Stoner* v. *California*, 376 U.S. 483 (1963) is misplaced. Both *Chapman* and *Stoner* addressed situations where a defendant's expectation of privacy was predicated upon the existence of a valid lease agreement between him and the consenting leasor. Here there was no lease upon which Solomon's expectation of privacy could be reasonably or even possibly based. Furthermore, despite the protections of *Simmons* v. *United States*, 390 U.S. 377 (1968), Appellant asserted no alternative basis for that expectation at the hearing. The only evidence before the Court demonstrated clearly that at the time of the search, the agents and police knew that the truck had been re-

warrantless search executed with the consent of the motel's manager. The defendant had registered in the motel, paid for one night's lodging in advance and, on the following day, implied to the bellboy that he intended to stay on for a few days. He left the room and did not reappear until after check-out time. In the meantime a chambermaid had cleaned the room for a new occupant and found some marijuana and a pipe in the room. This was reported to the manager who ordered the defendant checked out and called the police. When the defendant returned, he was met by a police officer and went with him to the station. The motel manager then reexamined the room and found a weapon in defendant's belongings and again called the police, who appeared, entered with the manager's consent and confiscated the weapon and the defendant's personal articles. The Court conceded that a warrantless search *during* the valid rental period even with the manager's consent would have been invalid; however, it was incumbent upon the defendant to demonstrate his control over the room to establish a right of privacy in it. The Court concluded that when the defendant left for the police station "he must have realized, or should have realized . . . any right he might have to have access to the room was not an exclusive right." 514 F.2d at 55.

Solomon's situation is not comparable to Parizo's for Solomon cannot establish that he was ever legitimately in possession of the truck pursuant to a valid rental agreement. Nevertheless, even assuming that he had a reasonable expectation of privacy prior to his arrival at the truck stop, once confronted by Synnett and the police "he must have realized, or should have realized" that his possession, and thus his privacy, was subject to intrusion and indeed termination. Thus, like Parizo he should have removed, or requested removal, of his attaché case. His failure to do so constituted an abandonment of that property and destroys his standing to contest its seizure.

ported stolen by National (HT 6, 27); that Solomon could provide no valid rental agreement even though this document was to be kept with the truck (HT 27); that the registration papers obtained from the truck did not belong to it (HT 9); and, finally, that the registration papers and license plates found on the recovered vehicle belonged to another truck that had been stolen (HT 9). Despite his claim, Appellant offered no evidence of a valid lease. There was none. At the hearing, Appellant did not question the validity of the theft reported by National. Neither did he allege the existence of a valid rental agreement nor assert a claim of confusion about the duration of that agreement. This case presents plainly and simply the question of a consent to search given by the rightful owner of property validly in his possession. Even assuming, *arguendo*, that Solomon had some basis upon which to assert a reasonable expectation of privacy, that interest could certainly be no greater than National's, in which case Synnett's consent was competent to waive Solomon's privilege. See *United States* v. *Cataldo*, 433 F.2d 38 (2d Cir., 1972); *United States* v. *Gargiso*, 456 F.2d 584 (2d Cir., 1970); *United States* v. *Ellis*, 461 F.2d 962 (2d Cir., 1972).

The facts here distinguish this case from the classic "automobile search" cases involving the warrantless search of a car belonging to a defendant who was arrested on charges unrelated to the possession of that vehicle. *Coolidge* v. *New Hampshire*, 403 U.S. 443 (1961); *Chambers* v. *Maroney*, 399 U.S. 42 (1970). Because of the nature of the property searched—a rental truck—Appellant quite properly analogizes this case to those involving searches of rental premises. (Appellant's Brief, p. 14). *Chapman*, *supra; Stoner*, *supra*. This Court's recent decision in *United States* v. *Parizo*, 514 F.2d 52 (2d Cir., 1975) offers a definitive treatment of this question. *Parizo* concerned a weapon obtained by police from a motel room through a

b. Even if the vehicle was in police custody, the warrantless search was valid.

Even if one were to view this case as a "typical" warrantless car search, the agents' actions were reasonable and did not violate Solomon's Fourth Amendment rights. Law enforcement officials have ample authority to conduct a warrantless search of a vehicle validly in their custody. *United States* v. *Carneglia*, 468 F.2d 1084 (2d Cir., 1972). As the Supreme Court noted in *Cady* v. *Dombrowski*, 413 U.S. 433 (1973), it has sustained "warrantless vehicle searches . . . in which the possibilities of the vehicles being removed or evidence in it destroyed were remote, if nonexistent." 413 U.S. at 441-2, citing *Harris* v. *United States*, 390 U.S. 234 (1968) and *Cooper* v. *California*, *supra*.

This Court has recently dealt with this issue in *United States* v. *Zaicek*, 519 F.2d 412 (1975). The search there concerned entry into the glove compartment of a stolen rental car and into a briefcase found in the locked trunk. The Court concluded that police can search an automobile validly within their custody without a warrant. The Court stated:

> The issue is not whether it would have been convenient or easy for the officers to obtain a warrant; the issue is whether they had a possessory interest in the car superior to that of [the defendant]. 519 at 414.

The agent's possessory interest here was clearly superior to Solomon's. Indeed, as this Court previously noted in *Carneglia*, *supra*:

> Given justification for the initial warrantless seizure of a vehicle . . . a later warrantless search will almost always be valid. 468 F.2d at 1090 (citations omitted).

The United States Court of Appeals for the Ninth Circuit has upheld a warrantless search of a seized rental vehicle in a remarkably similar factual context. *United States* v. *Beasley*, 476 F.2d 164 (9th Cir., 1973). There, at a traffic stop, police determined that the registration and license plates on the defendant's vehicle, did not match that vehicle's VIN. Learning that the car was owned by Avis Rent-A-Car, the officers requested the defendant accompany them to the station. Once there they searched the car without a warrant for evidence of ownership—specifically a "packing slip" from Avis—and in doing so, discovered a wallet which was opened to determine ownership. Relying on *Chambers* v. *Maroney*, *supra*, the Court upheld the search, concluding that probable cause existed for the search at the time the car was stopped and continued to exist at the station house. With regard to the wallet, the Court stated,

> It was reasonably and legally permissible for [the officer] to open it for the limited purpose of determining ownership. This is especially true when he found it in a car which he had reason to believe belonged to a rental agency. Limited and reasonable measures can be taken by a law enforcement official to protect property obvious to him and left in an automobile in his custody. 476 F.2d at 166 (citations omitted).

The actions taken by Agent Scheiner with respect to the briefcase here parallel almost exactly the officer's actions in *Beasley*. It would be unreasonable to require the agents to obtain a warrant in these circumstances.

c. Appellant has no standing to contest the search.

Appellant has no standing to contest the search of the truck and its contents. As this Court noted in *Parizo*, *supra*:

> Had the search occurred *during* the rental period, appellant would have standing to object to an unauthorized search of the premises, unless prior to the search he had abandoned the premises, thereby forfeiting his right to occupancy and privacy. . . . Preliminary to the inquiry into intentional abandonment by the defendant, it must be shown that the defendant had sufficient control over the premises to establish a right of privacy therein. 514 F.2d at 55.

The facts here compel a broader examination of the standing question. One must question the rights of a trespasser to contest a search of the property he invades. Several courts have concluded that a person found in possession of a stolen motor vehicle does not have standing to contest a search of the vehicle's contents. *United States* v. *Kucinich*, 404 F.2d 262 (6th Cir. 1968); *United States* v. *Sullivan*, 488 F.2d 139 (5th Cir., 1973); *Cassady* v. *United States*, 410 F.2d 379 (5th Cir., 1969); see *Amezquita* v. *Colon*, — F.2d — (1st Cir., 1973) 17 Cr. L. 2306.

The basis for the "automatic standing" doctrine of *Jones* v. *United States*, 362 U.S. 257 (1960) was significantly eroded by *Simmons* v. *United States*, 390 U.S. 377 (1968). The Supreme Court recognized this in *Brown* v. *United States*, 411 U.S. 223 (1973). In *Brown*, the Court held that there is no standing to contest a search where the defendant:

> (a) [was] not on the premises at the time of the contested search and seizure;

(b) alleged no possessory interest in the premises; and

(c) [was] not charged with an offense that includes, as an essential element of the offense charged, possession of the seized evidence *at the time of the contested search and seizure.* 411 at 229.

Appellant Solomon would appear to fail the Brown test in that he clearly was not with the truck when the briefcase was opened, he failed to allege a possessory interest in the premises searched, and he was not charged with possession of items in the briefcase at the time of the search. The Government respectfully submits that Appellant Solomon is without standing to contest the validity of the search of the truck and its contents.

CONCLUSION

For the foregoing reasons, the Motion to Suppress Evidence was properly denied and it is respectfully urged that the ruling of the District Court be affirmed.

Respectfully submitted,

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Appellant

AFFIDAVIT OF SERVICE BY MAIL

Albert Sensale, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 914 Brooklyn Ave Brooklyn, N.Y.

That on the 17th day of October, 1975, deponent served the within Brief for the Appellee upon Gregory B. Craig, esq. Federal Public Defender's Office 770 Chapel Street, New Haven, Connecticut 06510

Attorney(s) for the Appellant in the action, the address designated by said attorney(s) for the purpose by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in a post office official depository under the exclusive care and custody of the United States Post Office department within the State of New York.

Albert Sensale

Sworn to before me,

This 17th day of October 1975

Shirley Amaker

SHIRLEY AMAKER
Notary Public, State of New York
No. 24 - 4502766
Qualified in Kings County
Commission Expires March 30, 1977